

OCT 19 1994

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Petition of the Connecticut Department
of Public Utility Control to Retain
Regulatory Control of the Rates of
Wholesale Cellular Service Providers
in the State of Connecticut

PR Docket No. 94-106

REPLY COMMENTS OF
SPRINGWICH CELLULAR LIMITED PARTNERSHIP

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SUMMARY

The record in this proceeding supports an unequivocal finding that vigorous competition exists today in Connecticut. The most basic measure of the success of competition and consumer satisfaction with service quality and price is the unequaled growth in the consumer market. In the last 26 months alone, subscribership to Springwich's wholesale cellular network has more than doubled. This unprecedented level of subscriber growth (and the complete absence of any evidence whatsoever of consumer complaints regarding cellular services) is persuasive, concrete evidence of the aggressive competitive market forces at work in Connecticut. Competition functions at both levels of cellular service -- retail and wholesale -- to present consumers and resellers with sharply declining prices, innovative service plans and options, and the dramatically improving service quality and coverage which has resulted from the significant network investment by the wholesale carriers. All of these factors have occurred on a deregulated basis at the retail level and, at the regulated wholesale level, have occurred notwithstanding tariff authority for the wholesale carriers to raise their rates.

Not surprisingly, in the context of these market conditions, the Connecticut Department of Public Utility Control, after extensive hearings and discovery, did not reach any conclusions whatsoever that the rates of the wholesale carriers -- the only market segment regulated by the Department -- are unreasonable or discriminatory. Instead, the Department's Petition is based upon evidence which the Department found to be "contradictory" or "inconclusive", and upon which it now seeks Commission permission to continue rate regulation until it can investigate these matters further. The comments filed in support of the Department's Petition, however, would have the Commission believe that the Department's arguments to justify continued

investigation are based upon the type of specific findings and conclusions required to sustain continued regulation under the Budget Act. This is not the case.

Contrary to the allegations of several commenters, a careful review of the record evidence reveals that the Connecticut Department has *not* made the threshold findings required under the Budget Act for continued rate regulation. Specifically, the Department has not found that the rates of the wholesale carriers in Connecticut are unjust or unreasonable or that they would become so absent rate regulation. Instead, the comments filed by the proponents of continued regulation rely solely on the Department's findings and conclusions, and fail to provide any basis for this Commission to make the specific findings required by the Budget Act that consumers are not protected by market conditions in Connecticut or that competition is any less vigorous in Connecticut than elsewhere.

Furthermore, resisting the clear intent of Congress in the Budget Act, commenters supporting continued rate regulation disregard completely the consequences of continued asymmetrical regulation of the cellular wholesale carriers in the rapidly expanding and diversifying CMRS marketplace. As Congress quite correctly found, such regulatory disparity would be a severe impediment to the development of the market and must not be countenanced absent compelling circumstances. As the Commission must find from the evidence presented herein, those types of circumstances are wholly absent in Connecticut.

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Springwich Cellular Limited Partnership ("Springwich"), by its undersigned counsel, hereby replies to the comments filed on September 19, 1994 in the above-captioned proceeding. Springwich is the wholesale cellular carrier providing cellular mobile telephone service to resellers on the wireline "Band B" cellular frequencies throughout the State of Connecticut. As demonstrated in Springwich's Comments filed on September 19, 1994, and in the comments of a number of other parties,¹ vigorous competition exists today in the Connecticut cellular market.

¹ See Comments of Springwich; Opposition of Bell Atlantic Metro Mobile Companies ("Bell Atlantic/Metro Mobile" or "BAMM"); Opposition of McCaw Cellular Communications Company, Inc. ("McCaw"); Comments of GTE Service Corporation on behalf of GTE Mobilnet, Inc. and Contel Cellular, Inc. ("GTE"); Opposition of Cellular Telecommunications Industry Association ("CTIA"); and Opposition of Personal Communications Industry Association ("PCIA"). In addition, consistent with the position of these parties that continued rate regulation will have an adverse competitive impact in the CMRS industry, comments also were filed by several non-cellular CMRS industry members and their representatives who ask that the FCC declare particular CMRS services, such as ESMR and PCS, immune from state rate regulation if continued wholesale cellular rate regulation is permitted. See Comments of American Mobile Telecommunications Association; Comments of E.F. Johnson Company; Comments of Mobile Telecommunication Technologies Corporation ("M-Tel"); and Comments of Nextel Communications, Inc. ("Nextel") and Comments of Paging Network, Inc. ("PageNet"). For

This has been evidenced most clearly by the phenomenal growth in cellular subscribership over the past two years. The vigorously competitive nature of the market is also evident in the substantial network investments being made by both carriers to improve service quality, and by the aggressive price competition which has resulted in sharply declining wholesale rates well below tariff maximums and in the reasonable rates of return of the wholesale carriers.

In sharp contrast to this clear and convincing evidence, none of the comments filed in support of continued rate regulation provide any evidence by which the Commission could conclude that Connecticut market conditions justify continued rate regulation of the wholesale cellular carriers.² Nor do these commenters even address the competitive harm to the emerging commercial mobile radio service ("CMRS") market which would accrue by virtue of continued regulation of only one segment of that marketplace. Accordingly, Springwisch respectfully submits that the Connecticut Department of Public Utility Control's (the "Department's") request for continued rate regulation must be denied.

I. THE RECORD SUPPORTS A CLEAR FINDING THAT VIGOROUS COMPETITION EXISTS TODAY IN CONNECTICUT TO THE SUBSTANTIAL BENEFIT OF CELLULAR CONSUMERS

Competition in the Connecticut cellular marketplace has generated explosive growth in cellular subscribership. This growth has been fueled by aggressive network investment to

obvious competitive reasons, however, while vociferous in their contention that their own CMRS services should not be regulated, these parties stopped short of advocating that the Commission should refuse to permit continued rate regulation of the cellular wholesale carriers.

² See Comments of the State Attorney General; Comments of the Connecticut Office of Consumer Counsel; Comments of Connecticut Telephone, Inc. and Connecticut Mobilecom, Inc. (collectively "Connecticut Telephone"); and Comments of the National Cellular Resellers Association ("NCRA").

improve service quality and by sharply declining rates which have yielded reasonable rates of return for the wholesale cellular carriers below those which would generally occur under the type of rate of return regulation advocated by some commenters. These current market conditions conclusively demonstrate that competition both between the wholesale cellular carriers and in the unregulated retail cellular market have eliminated the concern for protection of consumers evidenced by the Omnibus Budget Reconciliation Act of 1993.³ Instead, competition in Connecticut has affirmatively fostered a vibrant and rapidly expanding consumer market for cellular service.

Contrary to the comments supporting continued rate regulation, the Department has not concluded otherwise. Indeed, just the reverse in the case. The Department's Petition seeks continued rate regulation authority to permit it to *investigate further* the Connecticut market conditions precisely because the Department has *not* concluded that market conditions in Connecticut are not competitive or that anti-competitive or discriminatory conduct exists. By relying solely on the arguments in the Department's Petition to justify the need for continued *investigation*, however, the commenters ignore completely the fundamental fact that based on the evidence set forth in the Department's Decision, gathered in extensive hearings and discovery, the Department itself did not reach the conclusions which the Commission must draw in order to sustain continued rate regulation under the Budget Act.⁴ Accordingly, based upon the clear and uncontradicted evidence of competition in the existing Connecticut cellular market and, as

³ Public L. 103-166, Title VI, 107 Stat. 379.

⁴ *DPUC Investigation Into the Connecticut Cellular Service Market and the Status of Competition*, Docket No. 94-03-27 (issued Aug. 8, 1994) ("Decision").

discussed below, the dampening impact which disparate regulation would have on the expanded CMRS market now emerging, the Commission must reject arguments for continued regulation.

A. Subscriber Growth Has Reached Unprecedented New Levels in Connecticut Demonstrating Consumer Satisfaction with the Service

Objective evidence on the conditions in the Connecticut cellular market demonstrates that the existing (and intensifying) competition between the wholesale cellular carriers and in the unregulated retail market has generated a flourishing and rapidly expanding consumer market for cellular service. The remarkable growth in cellular subscribership alone provides irrebuttable evidence that cellular prices are set at competitive market levels which have accelerated demand for cellular service and attracted new subscribers in record numbers. In the last 26 months alone, end user subscribership to Springwich's cellular network has more than doubled - - irrefutable evidence that consumers are responding to decreasing prices and improved service.⁵ The Bell Atlantic/Metro Mobile network has experienced similar subscriber growth as wholesale cellular prices have continued to fall and competition between the carriers has escalated.⁶ None of the commenters refute this fundamental fact of explosive subscriber growth, nor can they explain why such growth would occur absent consumer satisfaction with improved service and lower rates -- both the direct result of competition in the marketplace.

The Commission must reject arguments that disregard both this plain evidence of consumer satisfaction, and the complete absence of any contrary indication of consumer complaints. As the Department's Decision acknowledges, the record does not contain any

⁵ Springwich Comments at 4.

⁶ BAMM Opposition at 12.

evidence of consumer dissatisfaction with cellular services or rates.⁷ Neither the Comments of the State Attorney General nor those of the Office of Consumer Counsel, who attempt to create an image of consumer dissatisfaction with cellular service, produce any evidence of specific consumer complaints with cellular service quality or prices.⁸ They can produce no such evidence because there is none -- and the exploding growth of the market supports the opposite conclusion.

B. Retail Competition Has Flourished in Connecticut

In its Comments, Springwich described the significant introduction of a variety of unregulated retail service plans that address the needs of consumers with a variety of usage levels and cellular needs, and therefore make cellular service economical for a broad spectrum of subscribers.⁹ In addition, unregulated basic retail rate plans, around which these other rate plans have sprung up, have decreased by 34 percent, after inflation. The introduction of these diverse retail service plans also has been accompanied by a simultaneous significant increase in service value.¹⁰ This pricing responsiveness of resellers to consumer demand has contributed

⁷ Decision at 29, 32.

⁸ Moreover, apparently recognizing that lack of evidence, and also the complete lack of any nexus between wholesale rate regulation and retail consumer satisfaction, decreasing prices, and improved service, the State Attorney General's Comments argue to retain rate regulation primarily based upon the duopoly market structure established by the FCC, and the predictable and expected mathematical calculations of market concentration that have resulted from that structure. *See* State Attorney General Comments at 3. As the Commission itself determined in deciding to forbear from regulating the rates of the wholesale cellular carriers, the mere existence of the duopoly market structure and the market power, if any, held by cellular carriers is insufficient by itself to justify continued rate regulation. *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, 1421 (1994) ("*Second Report and Order*"); BAMM Opposition at 16.

⁹ Springwich Comments at 16-18.

¹⁰ *Id.* at 17.

directly to the growth in cellular subscribership that has averaged over 27% for resellers on Springwich's network in the first six months of 1994 alone.

As in other cellular markets, success in the retail market and market penetration has varied by reseller. Differences in subscriber bases are to be expected in a competitive market where resellers use different distribution and marketing strategies. In the retail cellular market, like other retail service markets, market penetration is often determined by each retailer's distribution and marketing strategies, and different resellers make different strategic cost/benefit decisions as to how best to minimize cost and maximize revenues. Not surprisingly, resellers that maximize their use of third party distribution outlets have a larger end user subscribership, albeit at an additional cost. Other companies may choose instead a strategy of direct marketing, which would almost certainly decrease subscriber numbers and would also impose a different cost structure. Similarly, different companies make different decisions as to capital investments -- which decisions will clearly have an impact on growth.

Vigorous retail competition and divergent marketing strategies have provided consumers with increased convenience and a variety of rate plans for purchasing cellular service -- all of which are direct benefits of unregulated retail competition. Springwich's retail affiliate Linx, for example, has over 235 third party retail outlets in Connecticut that sell cellular service to end users -- more than 10 times the number of outlets of any other reseller on the Springwich network. It also has entered into numerous co-marketing arrangements with other businesses in Connecticut and Massachusetts. In sharp contrast, the second largest reseller on Springwich's network has adopted a very different marketing strategy and has only 9 wholly-owned distribution outlets. These differing market strategies are simply that -- different strategies; and the subscriber

market shares which derive from different strategies cannot and do not indicate any *per se* anticompetitive causes.

While some commenters have attempted to correlate market share with reseller allegations of anti-competitive conduct, the distribution of market share is not indicative of such conduct but rather is the product of different market behavior by each reseller in a competitive market. As demonstrated by the growth in cellular subscribership, the service and price benefits of aggressive retail competition have been recognized and embraced by Connecticut consumers. These benefits represent precisely the type of vigorous CMRS marketplace envisioned by Congress in passing the Budget Act and promoting deregulation of all CMRS.

C. The Wholesale Carriers Compete Aggressively to Improve Service Quality by Making Substantial Investments in Network Improvements

Competitive forces in the Connecticut mobile services market have stimulated network investment by the wholesale carriers as they compete on service quality and coverage as well as price. As noted in Springwich's comments, both carriers have made significant investments in their networks.¹¹ Since 1985, Springwich has made network investment a priority in order to expand network coverage and facilities and thereby provide additional network value to cellular subscribers. The number of cell sites on Springwich's network alone has expanded from 17 in 1985 to over 90 that provide state-wide coverage today.¹²

The sizable network investments of the carriers are a direct response to competitive Connecticut market conditions and to consumer demand. As consumers have migrated from car

¹¹ Springwich Comments at 14.

¹² *Id.*

phone usage to portable phone usage, the carriers in Connecticut have responded by expanding network coverage to accommodate the demand for portable mobile phones that operate at low power and for digital services. In addition, in the face of the arrival of new CMRS providers, the wholesale carriers have adopted aggressive plans for continued network investment further demonstrating their continuing commitment to providing cellular resellers with the ability to offer state-of-the-art cellular services and expanding network coverage. The investment strategies of the carriers, that were shared with the Department on a protected basis, demonstrate that in Connecticut the wholesale carriers compete aggressively on service quality with each other and new CMRS providers.

D. The Sharply Decreasing Wholesale Prices and Reasonable Rates of Return of the Wholesale Cellular Carriers Demonstrate Aggressive Price Competition

The robustly competitive cellular retail market in Connecticut, with its improved and expanded services and its declining prices, could not have occurred without corresponding competitive pressure to decrease wholesale prices and to improve wholesale services. Since the introduction of cellular service, both wholesale carriers have continued to drop their prices well below the maximum allowed by their approved tariffs.¹³ The Department's Decision confirms the series of rate reductions and promotions that have been offered by both cellular carriers.¹⁴ Additional wholesale price reductions by each of the carriers have occurred as a result of

¹³ Springwich Comments at 15-16 and Ex. 7.

¹⁴ Decision at 11-12.

competitive pressures since the Department's record closed.¹⁵ In contrast to this specific evidence of the impact of competitive market conditions on prices, there is no evidence whatsoever that wholesale rate regulation has in any way encouraged or promoted the rate decreases or is needed to protect consumers. All of these rate reductions have been initiated by the carriers. Moreover, the decreases have occurred notwithstanding approved tariffs which would permit the carriers to increase rates substantially.

Given the tariff flexibility to *increase* rates, the causal effect of competition, as opposed to regulation, on prices is clear. Indeed, this downward competitive pressure on prices is confirmed by the rates of return of the wholesale carriers, which are at competitive (and even sub-competitive) levels. The rates of return demonstrate that Connecticut market conditions are functioning to depress cellular rates of return even more than would generally be permitted if rate of return regulation were in place.

E. Competitive Market Characteristics Compel Rate Deregulation Pursuant to the Budget Act

To grant a petition for continued rate regulation, the Commission must conclude affirmatively that market conditions in a particular state fail to protect subscribers from unjust or unreasonable rates.¹⁶ As with all other Commission decisions, its conclusion must be based on factual and evidentiary findings and adhere to the clear intent of Congress. *See e.g. Chevron,*

¹⁵ For example, as indicated in Springwich's Comments, in response to a rate decrease by Bell Atlantic/Metro Mobile in August, Springwich has implemented an additional 35% decrease in monthly wholesale rates to remain competitive with BAMM. Springwich Comments at 16.

¹⁶ 47 U.S.C. § 332(c)(3).

U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983). This minimum standard must be applied to the Commission's analysis of the Department's Petition. Therefore, to grant the Petition herein, the Commission must specifically and expressly find that market conditions are inadequate to protect subscribers from unjust and unreasonable rates.¹⁷ In making its determination, the Commission must therefore review the evidence submitted and, to sustain the Petition, would need ultimately to reach a conclusion not even reached by the Department -- that wholesale cellular carrier rates in Connecticut are *in fact* unjust and unreasonable, and that continued state rate regulation is necessary to protect subscribers from these conditions.

As the Decision containing the evidentiary determinations relied upon by the Department in support of its argument for additional investigation indicates, the Department itself did not make the specific finding required by the Budget Act -- that Connecticut market conditions are in fact inadequate to protect consumers from unjust and unreasonable rates.¹⁸ Contrary to the claims of commenters supporting continued regulation,¹⁹ the Department's Decision does not

¹⁷ 47 U.S.C. § 332(c)(3); *Second Report and Order*.

¹⁸ 47 U.S.C. § 332(c)(3). The Department's Petition merely seeks continued rate regulation authority to permit it to investigate further the market conditions in Connecticut precisely because it did not reach any such conclusion, even after extensive hearings and discovery into the conditions of the wholesale cellular market in Connecticut. The commenters therefore err in asserting that the Petition's arguments in support of continued investigation provide the Commission with the requisite evidence required by the Budget Act.

¹⁹ See State Attorney General Comments at 4 (citing reseller allegations of anti-competitive conduct that the Department determined required further review but did not support a finding); Connecticut Office of Consumer Counsel Comments at 8 (citing examples of alleged anti-competitive and discriminatory behavior, all of which did not result in findings of fact but were found to warrant further review before a determination could be made), Connecticut Telephone Comments at 5-6 (citing alleged "findings" by the Department and record evidence of mere

contain any conclusions that the carriers' rates are unjust or unreasonable.²⁰ Despite a complete record that included financial information, analysis of the approved tariffs of the wholesale carriers, extensive interrogatories, and a full week of hearings, the Department was unable to reverse its 1991 findings that the wholesale cellular carriers rates and rates of return are reasonable.²¹ Instead, the Department merely determined that the rates of the wholesale carriers require additional investigation.²²

In addition, while the commenters claim that the Department concluded that market conditions do not constrain anti-competitive and discriminatory practices, these arguments are not supported by the evidentiary record or the Decision. A review of the Department's Decision reveals that the Department did not make any evidentiary findings of anti-competitive and discriminatory conduct as alleged by the State Attorney General and other proponents of regulation in their comments.²³ The Department has merely determined that contradictory evidence was presented regarding these allegations and that further investigation of certain of those claims is warranted before findings can be made or conclusions drawn.²⁴ The proponents of regulation have not presented any additional evidence to permit the FCC to draw a different

allegations by resellers that were unsubstantiated and often contradicted).

²⁰ Decision at 14-15.

²¹ *Id.* at 11, 14-15, 28; *See Application of Springwich Cellular Ltd. Partnership for Declaratory Ruling Re: Forbearance from Regulation of Cellular Telephone Mobile Telephone Service*, No. 90-08-03 (Sept. 25, 1991).

²² Decision at 11, 14-15, 28.

²³ *Id.* at 26-27; State Attorney General Comments at 3; Office of Consumer Counsel Comments at 2; NCRA Comments at 3.

²⁴ Decision at 27.

conclusion.

To the extent the Department determined that the evidence is inconclusive at best, as it did on all of the issues of rates and anti-competitive and discriminatory conduct, continued rate regulation under the Budget Act would require that the Commission independently determine that specific evidence exists to support the findings asserted by several commenters but not reached by the Department. A review of the evidence, however, demonstrates conclusively that no such specific evidence exists upon which to conclude that market conditions in Connecticut are unique and do not adequately protect consumers.

II. CONNECTICUT CONSUMERS WILL BENEFIT FURTHER BY ELIMINATION OF RATE REGULATION

A. Elimination of Rate Regulation Will Promote Even Greater Price Competition Among the Wholesale Cellular Carriers Which Will Benefit Connecticut Consumers

As demonstrated above, continued rate regulation of the wholesale cellular carriers is unnecessary and will deny consumers in Connecticut the full benefits of competition. The Department has proposed to retain its current form of rate regulation if the Petition is granted by requiring the wholesale carriers to file rate changes within the approved tariffed rate bands on 5 days' advance notice to their resellers.²⁵ As the Commission has repeatedly found, rate regulation serves to impede competition. Any tariff requirement takes away a carriers' ability to make rapid, efficient responses to changes in demand and cost, removes incentives to introduce new offerings, and impedes normal competitive incentives for price discounts, since all

²⁵ The Department also intends to initiate a proceeding on July 1, 1996 to investigate the impact of new CMRS entrants. Decision at 19, 29. In addition, it intends to conduct further investigations into matters it determined to be inconclusive. *Id.* at 27-30.

price changes are public and therefore can be quickly matched by competitors.²⁶ Elimination of the tariff requirements will eliminate these anti-competitive effects.

These effects are present whether the advance tariff notice period is 30 days, five days, or even one day.²⁷ With any tariff requirement, pricing and service information is fully available to competing carriers and therefore lessens the competitive advantage to be gained by a rate decrease.²⁸ Dr. Jerry Hausman, a witness in the Department's investigation, confirmed the dampening effect of advance tariff filings on competition:

When your competitors get advance notice, you know they are going to expand, and typically, when you cut your prices in business, what you want to do is grab some more market share before the competition can respond. If they have advance notice, you are not going to be able to grab as much share, so you *will not be able to compete as hard*. That is a real danger in *any* advance notice.²⁹

As discussed below, the anti-competitive effect of continued tariff requirements will be even more pronounced in a market where the competitors of the regulated cellular wholesale

²⁶ *Second Report and Order* at ¶ 177; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order*, 85 F.C.C.2d 1 (1980) Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 (1981); *Second Report and Order*, 91 F.C.C.2d 59 (1982) recon., 93 F.C.C.2d 54 (1983); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17,308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28, 292 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 96 F.C.C.2d 922 (1984); *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984); *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), *reversed and remanded sub nom., MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); *rev'd on other grounds, MCI Telecommunications v. AT&T*, 114 S.Ct. 2223 (1994).

²⁷ Although non-dominant carrier domestic interstate tariffs are effective on one day's notice, the FCC nevertheless determined that it is in the public interest to forebear from tariff requirements for all cellular carriers, and indeed *prohibited* voluntary tariff filings by cellular carriers. *Second Report and Order* at ¶¶ 177-79.

²⁸ *Id.*

²⁹ DPUC Docket No. 94-03-27, Tr. at 575-76 (emphasis added).

carriers will not be subject to tariff requirements or rate regulation.³⁰ As demonstrated above and in the comments of a number of parties, the wholesale carriers in Connecticut are already responding to the imminent arrival of competition from new CMRS providers including ESMR and PCS providers by improving service quality and decreasing prices.³¹ Bell Atlantic/Metro Mobile's Comments correctly note that competition in the cellular market, as in many other industries, takes place at the margin.³² Accordingly, although the new CMRS providers' initial market shares may be small, their entry alone will have a tremendous effect on the existing market -- which impact will be artificially enhanced if disparate rate regulation is permitted.³³

B. Disparate Regulation of the Cellular Wholesale Carriers Will Impede the Full Benefit of Increasing CMRS Competition

The comments filed by non-cellular CMRS providers and their representatives which seek to assure that the Commission will not permit rate regulation of their services plainly indicate the disadvantage that they perceive rate regulation would have on their ability to compete in the CMRS marketplace.³⁴ Moreover, for obvious competitive reasons, the concern that these parties

³⁰ As the comments of Nextel and M-Tel indicate, those new CMRS carriers view entry into the Connecticut market on an unregulated market to be of critical importance.

³¹ Springwich Comments at 13, 14; BAMM Opposition at 12; McCaw Opposition at 20. The existence of already-constructed Nextel antenna sites, together with the Commission's recent announcement that the first broadband PCS auctions will begin on December 5, 1994, plainly indicates that such arrival is imminent.

³² BAMM Opposition at 17.

³³ *Id.* at 13.

³⁴ Nextel Comments at 12 (seeking exclusion of non-dominant CMRS providers, including ESMR and PCS providers); M-Tel Comments at 2 (requesting that paging and narrowband PCS be expressly exempt from rate or entry regulation in Connecticut); PageNet Comments at 3-5 (requesting that any continued rate regulation apply only to cellular providers); E.J. Johnson

express with respect to rate regulation of their own services stops short of advocating that cellular carriers be treated equally. Indeed, some of these parties openly seek disparate regulatory treatment for cellular services and therefore consequent competitive market advantages for their own unregulated service.³⁵ These comments demonstrate the wisdom of Congress in mandating regulatory parity in regulation of all CMRS absent *compelling* evidence to the contrary. This transparent effort must be rejected where, as here, there is clear evidence of the competitive nature of the marketplace. There has been no attempt to show, and there is absolutely no evidence in this proceeding, that disparate treatment of cellular services, *vis a vis* other CMRS, is in any way justified or appropriate.

III. THE WHOLESALE CELLULAR CARRIERS HAVE NOT ENGAGED IN ANTI-COMPETITIVE OR DISCRIMINATORY CONDUCT

The comments in support of continued regulation lack any evidence whatsoever that the wholesale cellular carriers have engaged in anti-competitive or discriminatory conduct. Indeed, their comments rely exclusively on the arguments raised in the Department's Petition, which seeks Commission approval to continue its investigation. The comments wholly ignore, however, the Department's Decision, which contains the Department's evidentiary findings. Review of the Decision reveals instead that, after its extensive hearings, the Department did not make any findings of fact or reach any conclusions on the validity of a few resellers' allegations of anti-

Comments at 5 (requesting that local SMR licensees be exempt from state rate regulation).

³⁵ Nextel Comments at 12.

competitive and discriminatory practices.³⁶ Instead, the Petition seeks continued rate regulation to permit the Department to investigate further the Connecticut market conditions precisely because it did not conclude that market conditions in Connecticut are not competitive.

Confronted with a record that even the Department determined was inconclusive, the commenters supporting continued regulation reiterate the claims of anti-competitive and discriminatory practices alleged by the few cellular resellers who participated in the Department's investigation. Again, however, they fail to acknowledge that the Department did not draw *any* conclusions in its Decision regarding the validity of these claims, and instead their comments try to recast inconclusive evidence as persuasive support for the findings required by the Budget Act.³⁷ At most, however, the Department determined only that some of the reseller claims require further investigation.³⁸

Springwich can, however, agree with these commenters that the Department conducted

³⁶ Any argument that these commenters might raise to support a reading of the Petition inconsistently with that of the underlying Decision must be rejected. Under Connecticut law, the Decision, not the Petition, constitutes the final order of the Department. As a final order, the Decision cannot be modified without additional proceedings by the Department, and any effort by commenters to imply that the Petition may be read inconsistently with its underlying Decision must therefore fail. Conn. Gen. Stat. § 4-181a.

³⁷ State Attorney General Comments at 2; Office of Consumer Counsel Comments at 2-3, 8; Connecticut Telephone Comments at 4-6. Indeed, these commenters seek to re-raise claims that the Department discarded as unworthy of any further investigation. Even unsubstantiated claims already rejected by the Department, including claims relating to tariffed policies, terms of financing agreements that were alleged but shown to be non-existent, and credits for dropped calls are once again alleged by the proponents of continued regulation in their comments as a basis for continued rate regulation. BMM Opposition at 24-25. The Commenters therefore once again fail to meet the Budget Act standard.

³⁸ Decision at 27-28.

a comprehensive and thorough examination of the wholesale cellular market.³⁹ Given the depth and breadth of that investigation, which was among the most (if not *the* most) comprehensive of any state regulatory commission on this question, it is particularly striking that all of the allegations of anti-competitive behavior that were made, the Department found to be inconclusive at best. As McCaw noted in its Comments, in markets where a wholesale supplier offers service through its own retail affiliates and through independent resellers, complaints by independent resellers are common, but are not *per se* evidence of anti-competitive behavior.⁴⁰

Indeed, given the high-powered microscope applied to the Connecticut marketplace, the dearth of such reseller allegations, and the inconclusiveness of even those few allegations on the one hand, and the declining rates and improving services which have prevailed on the other hand, the thoroughness of the Department's investigation should lead the Commission to conclude just the opposite of the result suggested by the commenters -- Connecticut is a marketplace functioning efficiently and effectively. Springwich believes that, particularly after such an exhaustive review, the Department's Decision demonstrates that there are no market conditions that warrant continued rate regulation. There have been no findings that the rates of the carriers are unjust or unreasonable, no findings that the carriers are earning supra-competitive profits, and the only allegations of anti-competitive conduct and discrimination are admittedly "inconclusive" and emanate from two cellular resellers who have a vested interest in continued regulation of the wholesale carriers.

³⁹ State Attorney General Comments at 3; Office of Consumer Counsel Comments at 10; Connecticut Telephone Comments at 4.

⁴⁰ McCaw Opposition at 19.

Connecticut Telephone, the largest independent cellular reseller that participated in the Department's investigation, focused its testimony in the Department's hearings primarily on concerns about volume discounts, equipment bundling, and information sharing, none of which warrant continued rate regulation of the wholesale carriers. Significantly, in an earlier Department proceeding approving Springwich's volume discount structure, Connecticut Telephone had urged the Department to approve the very volume discount structure it now claims is discriminatory.⁴¹ Equipment bundling is a retail marketing issue that is not regulated by the Department and therefore cannot justify continued wholesale rate regulation, especially where the Commission has determined the practice to be in the public interest.⁴² Finally, Connecticut Telephone's own witness testified that the single isolated instance in which it believed retail information may have been shared between Springwich and its retail affiliate was a "limited circumstance."⁴³

With respect to all of the other inconclusive allegations of anti-competitive behavior, the proponents of continued regulation are forced to rely on the testimony of a single reseller who,

⁴¹ Tr. at 825. Connecticut Telephone's support for the volume discount structure was noted by the Department in its decision approving volume discounts:

One customer, [Connecticut Telephone] in a letter to the Department supported [Springwich's] proposal by stating that volume discounts will allow greater flexibility to control and manage costs, providing it with the ability to increase customer bases through innovative pricing plans, and allow each reseller to better position itself against heavier competition.

Re SNET Cellular, Inc., 91 PUR 4th 525, 534-35 (1988).

⁴² *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order*, 6 FCC Rcd. 4028, 4030 (1992).

⁴³ DPUC Docket No. 94-03-27, Tr. at 825.

not coincidentally, is approximately \$1 million in debt to Springwiche and, accordingly, has financial motivations to attribute his company's business failure to practices by Springwiche.⁴⁴ Importantly, moreover, while that reseller's allegations were championed by these commenters, the record reveals that Springwiche diligently attempted to resolve this reseller's concerns and that this reseller's complaints were *not* generally shared by other resellers.⁴⁵ In a state with 15 resellers, the allegations of one reseller are not indicative of market conditions in Connecticut.⁴⁶ As demonstrated in Springwiche's comments, moreover, the allegations of this reseller are untrue and should not be accepted as probative evidence. The reseller's course of conduct in operating his business while in bankruptcy and subject to orders of the bankruptcy court caused the Trustee to complain to the court and showed violations of the court orders and IRS problems. These alone suggest that the Commission should be extremely skeptical of this reseller's unsubstantiated and contradicted allegations.⁴⁷

Even if these isolated instances of anti-competitive behavior were true -- which they are not -- the proponents of continued rate regulation further fail to demonstrate how continued *rate regulation* of the wholesale cellular carriers would correct the purported anti-competitive practices at the retail level. Such a connection is an essential aspect of the standard established by the Budget Act, which requires both a showing that: (1) competitive conditions are inadequate to

⁴⁴ See Springwiche Comments at 40-42; BMM Opposition at Appendix A, p. 20.

⁴⁵ In its Comments and the Affidavits attached thereto, Springwiche responded to the claims of anti-competitive conduct alleged by this single reseller and detailed its efforts to work with this reseller.

⁴⁶ Springwiche Comments at 31.

⁴⁷ See Springwiche Comments at Ex. 11.

protect consumers; and (2) continued rate regulation will provide the necessary protection. 47 U.S.C. § 332(c)(3)(B). The allegations of anti-competitive conduct and discrimination wholly unrelated to wholesale cellular services, such as placement of Yellow Pages advertisements and financing agreements, cannot and would not be resolved by the proposed continuation of wholesale cellular rate regulation.

IV. CONTINUED RATE REGULATION WILL NOT ELIMINATE THE FEDERAL REMEDIES AVAILABLE TO ADDRESS CLAIMS OF DISCRIMINATION OR ANTI-COMPETITIVE BEHAVIOR

Adequate remedies exist to address claims of anti-competitive or discriminatory conduct absent continued rate regulation. The Commission's governing statute, and its cellular policies, prohibit any cellular carriers from discriminating between customers and from restricting resale. Any violation of these policies and statutory requirements should appropriately be remedied through the FCC's enforcement authority.⁴⁸ The FCC has broad authority under the Communications Act to enforce the requirements of the Communications Act. 47 U.S.C. §§ 201-02, 206-09 (1987).

Indeed, while the Budget Act gives the Commission wide latitude to forbear from Title II regulation of CMRS providers, it specifically precludes forbearance from application of the Sections 201, 202 and 208 of the Communications Act.⁴⁹ The Congress thereby expressly

⁴⁸ See BMM Opposition at 23; McCaw Opposition at 27.

⁴⁹ 47 U.S.C. § 332(c)(1)(A). As the Commission is well aware, Section 201 of the Communications Act requires that all common carrier charges, practices classification and regulations be just and reasonable; Section 202 of the Act requires that common carriers not make any unjust or unreasonable discrimination in charges, practices classifications, regulations, facilities or services for or in connection with like communications services; and Section 208 of the Act vests the FCC with jurisdiction to address complaints filed against common carriers for

preserved at the Commission its obligation to assure just, reasonable and non-discriminatory rates. As recognized by the Commission in the *Second Report and Order*, compliance with Sections 201, 202, and 208 provides sufficient protection for consumers in the event competition fails to do so, noting that "[i]n the event that a carrier were to violate Sections 201 or 202, the Section 208 complaint process would permit challenges to that carrier's rates or practices, and provides in addition compensation for any harm due to violations of the Act through the award of damages."⁵⁰ Denial of the Petition, therefore, will not preclude cellular consumers, including the Connecticut resellers, from seeking redress of complaints regarding discriminatory or unjust and unreasonable practices by the wholesale carriers in the unlikely event that such practices ever occur.

any violations of the Communication Act including Sections 201 and 202.

⁵⁰ *Second Report and Order* at ¶¶ 176-77.